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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 384

HOWARD E. BREISCH,
Petitioner,

v.

CENTRAL RAILROAD OF NEW JERSEY

OPPOSING BRIEF OF RESPONDENT TO PETITION FOR CERTIORARI

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OPINION BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 110) is reported in 112 F. (2) 595.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 3, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The statutes involved in this case are the Federal Safety Appliance Act of April 14, 1910 (Title 160, Sec. 2, 36 Stat. 298); and the Pennsylvania Workmen's Compensation Act of 1915, P. L. 736.

QUESTION PRESENTED

Where an employee of a railroad company was employed and injured in the Commonwealth of Pennsylvania while neither he nor the railroad company was engaged in interstate commerce or transportation, did the Circuit Court of Appeals err in deciding that the employee had no right to sue for damages at law, and that his sole remedy was to recover compensation as provided under the Pennsylvania Workmen's Compensation Act?

STATEMENT OF THE CASE

The petitioner, Howard F. Breisch, brought an action in trespass to recover damages for injuries sustained by him while working for the respondent railroad company in the yard of the American Steel and Wire Company in Allentown, Pennsylvania, on December 31, 1936.

In his Complaint, petitioner averred that the crew to which he had been assigned, while in the act of shifting a freight car from which he fell, negligently caused the car to run away from its engine, and the respondent company, contrary to the provisions of the Federal Safety Appliance Acts, permitted the petitioner, its employee, to handle a freight car with a defective hand brake and coupler.

The respondent company filed an affidavit of defense in which it contended, among other things, that any rights which the petitioner might have in the matter were entirely controlled by and relegated to the Pennsylvania Workmen's Compensation Act of 1915.

At the trial of the case, it was definitely established, and the Trial Judge held, that neither the petitioner nor the respondent were engaged in interstate commeree or transportation at the time of the accident (R. 93).

The Trial Judge allowed the case to go to the jury upon a point of law reserved, and the jury rendered a verdict in favor of petitioner in the sum of $12,000.00, and after argument upon the reserved point and upon respondent's motion for judgment on the whole record, judgment was duly entered in the District Court in favor of the petitioner and against the respondent.

Whereupon respondent appealed to the Circuit Court of Appeals for the Third Circuit, which decided and held that petitioner's sole rights and remedies were under the Pennsylvania Workmen's Compensation Act and the judgment of the District Court was reversed.

ARGUMENT

(1)
The Circuit Court of Appeals Did Not Decide an Important Question of Local Law in Conflict with Applicable Local Decisions

The Pennsylvania Workmen's Compensation Act of 1915, P. L. 736, which was in full force and effect at the time of the accident herein complained of, provides as follows:

> "Section 302. (a) In every contract of hiring made after December thirty-first, one thousand nine hundred and fifteen, and in every contract of hiring renewed or extended by mutual consent, expressed or implied, after said date, *it shall be conclusively presumed that the parties have accepted the provisions of article three of this act, and have agreed to be bound thereby,* unless there be, at the time of the making, renewal, or extension of such contract, an express statement in writing, from either party to the other, that the provisions of article three of this act are not intended to apply, and unless a true copy of such written statement, accompanied by proof of service thereof upon the other party, setting forth under oath or affirmation the time, place, and manner of such service, be filed with the Bureau within ten days after such service and before any accident has occurred. Every contract of hiring, oral, written, or implied from circumstances now in operation, or made or implied on or before December thirty-first, one thousand nine hundred and fifteen, shall be conclusively presumed

to continue subject to the provisions of article three hereof, unless either party shall, on or before said date, in writing, have notified the other party to such contract that the provisions of article three hereof are not intended to apply, and unless there shall be filed with the Bureau a true copy of such notice, together with proof of service, within the time and in the manner hereinabove prescribed."

"Section 303. Such agreement shall constitute an acceptance of all the provisions of article three of this act, and *shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of the employment, or to any method of determination thereof, other than as provided in article three of this act.*"

In numerous cases decided subsequent to any of the Pennsylvania cases cited by petitioner, the Supreme Court of Pennsylvania has clearly and definitely enunciated and re-enunciated the principle that the Pennsylvania Workmen's Compensation Act provides the sole and exclusive method of securing compensation for injuries sustained by an employee and that an action in trespass will not lie.

See: *Venezia, Appellant v. Phila. Elec. Co.*, 317 Pa. 557 (decided February 4, 1935):

By the Court (page 558):

"Was plaintiff an employee of defendant when he was injured on June 2, 1931? The trial judge held that he was and that he therefore could not maintain this common-law action for damages, and accordingly entered a nonsuit, which the court in banc refused to take off. Plaintiff appealed."

"If plaintiff was at the time of the accident an employee of defendant, then the Workmen's Compen-

sation Act of June 2, 1915, P. L. 736, furnished the exclusive method of securing compensation for his injury, and an action in trespass would not lie: Campagna v. Ziskind, 287 Pa. 403; Persing v. Citizens Traction Co., 294 Pa. 230. As used in that act, the terms 'employer' and 'employee' are synonymous with 'master' and 'servant' (sections 103 and 104), and if plaintiff was at the time of the accident the servant of defendant he was also its employee: Persing v. Citizens Traction Co., supra; see Smith v. State Workmen's Ins. Fund, 262 Pa. 286" (page 559).

"Plaintiff's own testimony shows conclusively that he was a servant and therefore an employee of defendant, and the court below therefore acted properly in entering a nonsuit on the ground that he could not maintain an action of trespass for his injury, his sole remedy being that provided by the Workmen's Compensation Act" (page 560).

"Judgment affirmed."

Persing v. Citizens Traction Co., 294 Pa. 230:

By the Court:

"The real question for determination rests on the ruling of the court below which formed the basis for the entry of the nonsuit. It held that, under the circumstances presented, Persing, though generally employed by Jeffrey as a mechanic in his automobile business, was for the time being let as a driver of the tractor to the railway company. While so engaged he was under the control and subject to its orders, and, as a result, must be treated as an employee of the defendant at the time of the accident. The court therefore held that the Workmen's Compensation Act controlled, and any redress for the injury sustained must be secured as therein provided. If Persing was at the

time a servant of the street railway company, then the legislation referred to (June 2, 1915, P. L. 736) furnished a proper and exclusive method for securing compensation for the loss suffered in the course of his service, as its provisions were impliedly accepted by him. Where the plaintiff is within the scope of this statute when the injury occurs, an award of compensation as therein fixed must be held to furnish the only satisfaction obtainable, and an action in trespass will not lie" (page 234).

"If the plaintiff became a temporary servant of the defendant company, then no recovery in a common law action of trespass could be sustained. To defeat his suit, it was necessary to show that he was an employee, and this appears affirmatively from the record" (page 235).

Therefore, in the State of Pennsylvania, we start with the general proposition of law that an injured employee's only redress is under the State Workmen's Compensation Act.

In taking a contrary position, petitioner relies on two Pennsylvania cases, viz., *Sims v. Pennsylvania Railroad Company,* 279 Pa. 111, and *Miller v. Reading Co.,* 292 Pa. 44.

Consideration of the case of Sims v. Pennsylvania Railroad (*supra*) can be dismissed at once for the reason that no question concerning the Pennsylvania Workmen's Compensation Act was touched upon in that case.

As to the case of Miller v. Reading Co. (*supra*), the most that can be said for it is that it is an erroneous effort to interpret a Federal Statute and was so viewed by the Circuit Court of Appeals for the Third Circuit in deciding the case at bar. In its decision the Circuit Court of Appeals said (R. 110):

"In the light of the foregoing we must conclude that the Supreme Court of Pennsylvania reached the conclusion that the Compensation Act did not apply to Miller's case, not as a matter of the statutory construction of that Act but because it thought that the proper construction of the Federal Safety Appliance Acts required the ruling that Miller had a cause of action under the Safety Appliance Acts, cognizable in a court of law but not within the purview of the Compensation Law. The conclusion reached by the Supreme Court of Pennsylvania constitutes an erroneous construction of federal statutes and is not binding upon us. The remedy of the appellee lies solely in the Pennsylvania Workmen's Compensation Act and was not cognizable in an action at law."

That this view of the Miller case (*supra*) so taken by the Circuit Court of Appeals is the correct one must be apparent by a reference to the case of *Tipton v. Atchison, Topeka and Santa Fe Railroad Company*, 298 U. S. 141, which is the last word on this subject and which is almost identical with the case at bar.

In the Tipton case (*supra*), the petitioner brought an action in California against the respondent to recover for injuries sustained by him in the course of employment as a switchman. The injury was caused by a defective coupling upon a freight car.

The Circuit Court of Appeals for the Ninth Circuit held, that as the petitioner, when injured, was not engaged in interstate commerce he could ask redress only under the California Workmen's Compensation Act, and when the petitioner sought review by your Honorable Court on the ground that the decision conflicted with the adjudication of the California Courts sustaining the right to obtain an action for damages in like circumstances, your Honorable Court held that the Circuit Court of Appeals committed no

error in construing the 'Workmen's Compensation Act as affording the only remedy available to the petitioner.

And in the Tipton case (*supra*), there had been cited two decisions by the courts of California to the effect that the plaintiff could bring an action for damages in the local courts, under similar circumstances, and despite the said Workmen's Compensation Law, and while neither of these cases were appellate cases, they, nevertheless, had both been appealed to the highest court of appeals in California and certioraries were denied. In this connection your Honorable Court said:

> "If we were convinced that the court acted solely upon a construction of the workmen's compensation law, uninfluenced by the decisions following the supposed authority of the Rigsby case, we should not hesitate to hold United States Courts bound by such construction of the State Statute. But the terms of the state compensation law, and the California decisions construing it, lead us to doubt that it is so" (page 152).

In order to clearly understand the weakness and inapplicability of the Miller case, we must first consider a similar case, decided by the Supreme Court of Pennsylvania about two years prior thereto, viz., *McMahan v. Montour Railroad Co.*, 283 Pa. 274. In this case, wherein plaintiff sought to recover from personal injuries, relying on the Federal Safety Appliance Acts, the Supreme Court of Pennsylvania in a per curiam opinion said (page 276):

> "We agree with the court below that the facts proved do not bring plaintiff within the act relied on, and it did not err in denying a right to recover in the present action. As said by the court below, 'The State of Pennsylvania has made ample provision for employees, who are injured in the course of their employment, in what is known as the Workmen's Compensa-

tion Act; to the tribunal provided in that statute the plaintiff in this case has recourse, and, in our opinion, to it alone'."

When the Montour case was subsequently reversed by your Honorable Court, the Pennsylvania Supreme Court, as suggested by your Honorable Court in the Tipton case, apparently missed the real reason for the reversal and, subsequently, when called upon to decide the Miller case, it was clearly influenced not only by its misunderstanding of the Montour reversal but also by the general misunderstanding of the decision of your Honorable Court in the Rigsby case.

In the Tipton case (*supra*), your Honorable Court said (page 148):

> "In McMahan v. Montour R. Co., 270 U. S. 628, cited by petitioner, the judgment of the state court was reversed, not because that court had held that the remedy for breach of duty imposed by the Safety Appliance Acts was afforded by the state workmen's compensation law, but because of its erroneous decision that the Federal Acts were inapplicable to the cars used in intrastate operation of the railroad, although it was a highway of interstate commerce."

In addition to the foregoing statement by your Honorable Court in the Tipton case, and further distinguishing and discarding the effect of the Miller case, your Honorable Court also said (page 147):

> "As respects an injury occurring during the course of employment in intrastate activities on a highway of interstate commerce, the question has arisen whether a state may substitute workmen's compensation for the common law or statutory action whereby damages could have been recovered for violation of the Safety Appliance Acts. A number of courts

have interpreted the discussion in the Rigsby Case as a denial of the power of the states to make the substitution (and here, in a foot-note, your Honorable Court refers to the Miller case among others)."

"This court has recently reaffirmed the principle that the Safety Appliance Acts do not give a right of action for their breach but leave the genesis and regulation of such action to the law of the states."

From the foregoing, it must be apparent that the Pennsylvania decision in the Miller case (*supra*), being at its best an erroneous effort to interpret a Federal Statute, cannot possibly prevail against the decision of your Honorable Court in the case of Tipton v. Atchison, Topeka and Santa Fe Railroad Company (*supra*), which squarely holds that petitioner's sole and exclusive remedy must be had under the State Workmen's Compensation Act.

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(2)

The Decision of the Circuit Court of Appeals in This Case Does Not Conflict with Decisions of Other Circuit Courts of Appeals

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Petitioner contends that the decision of the Circuit Court of Appeals in this case conflicts with the decision of other Circuit Courts of Appeals but the only case cited in support of this contention is the case of *Leuthe v. Erie R. R. Co.*, 83 F. (2d) 1013, which was affirmed by the Circuit Court of Appeals for the Second Circuit in a per curiam opinion.

To understand the force of this decision we must examine the opinion of the Lower Court (12 F. Supp. 161) which discloses that the case was also allowed to go to the jury under the provisions of the Federal Employer's Lia-

bility Act for the reason that at the time of the injury the plaintiff was engaged in interstate transportation or in work so closely allied to it as to be practically a part of it and therefore the New York Workmen's Compensation Act was clearly inapplicable.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals in the case at bar does not conflict with the above decision or with any other decision of any other Circuit Court of Appeals.

Conclusion

In view of your Honorable Court's decision in the above referred to case of Tipton v. Atchison, Topeka and Santa Fe Railroad (*supra*), which definitely clarified the law on this subject, and no element of interstate commerce or transportation appearing in this case, it is respectfully submitted that the Circuit Court of Appeals for the Third Circuit committed no error in holding that the Pennsylvania Workmen's Compensation Act affords the only remedy available to the petitioner; and inasmuch as the exigencies of this case are not of such importance as to require your Honorable Court to grant a writ of certiorari the petition should be dismissed.

Respectfully submitted,

AUBREY AND FRIEDMAN,

By: GEORGE W. AUBREY,

Attorneys for Respondent.